No. 12,571

In the United States Court of Appeals for the Ninth Circuit

DUANE MOSS, ET AL., APPELLANTS

v.

HAWAIIAN DREDGING CO., APPELLEES

MARTIN H. LARSEN, ET AL., APPELLANTS

v.

FLOOD BROS., A CORPORATION, ET AL., APPELLEES

CONSOLIDATED CASES, HEREBY REFERRED TO AND MADE A PART HEREOF BY NUMBER:

Nos. 25300, 25301, 25302, 26061, 26062, 26063, 26064, 26065, 26066, 26067, 26068, 26069, 26070, 26071, 26072 26073, 26074, 26075, 26076, 26077, 26078, 26242, 26243, 26245, 26247, 26535, 26536, 26537, 27001, 26919.

BRIEF ON BEHALF OF APPELLEES

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COUNTER STATEMENT OF CASE

It is our understanding that the single issue to be argued at this time is the constitutionality of P. L. 177 and P. L. 393, 81st Congress, 1st Session;[1] and that the limitation of the

[1] P.L. 393, which is commonly called "Fair Labor Standards Act Amendments of 1949", and which deals with many matters in addition to overtime, was under consideration by the 81st Congress at the time it enacted P.L. 177. The provisions of Sections 7(d)(6) and 7(d)(7) of P.L. 393 are the same, in substance, as the provisions of Section 1 of P.L. 177. Section 16(e) of P.L. 393 is the same, in substance, as Section 2 of P.L. 177. P.L. 177 was repealed by Section 16(f) of P.L. 393, which, however, reenacted P.L. 177 as

hearing to this issue is pursuant to an oral stipulation of appellants' counsel that in the event of a decision sustaining the constitutionality of these statutes judgments may be entered for the defendants in all the consolidated cases. See Transcript, pp. 70, 74, 75.

Pages 5 to 21 of appellants' brief are devoted to what is called "Background and Preliminary Considerations". Many of the statements therein are incorrect, or are but misleading segments of the evidence.[2] Similar inaccurate

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above stated. The full text of P.L. 177 and of applicable sections of P.L. 393 appear at pages 18 to 21 of the Appendix of this brief. The House and Senate Committee reports on P.L. 177 appear beginning at page 21 and page 28, respectively, of the Appendix.

[2] For example:

(a) At pages 5 and 6 it is said that the longshore industry has never operated on a "regular basis so far as daily hours of work are concerned", and that work at all hours of the day and on all days of the week is the same, except that work at night or on Sundays and holidays is more "dangerous, difficult and unpleasant" and carries a higher rate only for this reason. Hence—it is said at pages 8 and 9—all rates are regular rates; and there is no such thing as overtime in the longshore industry (see fn. 2, p. 7). Presumably appellants' purpose in making these statements is to lay a basis for arguing that the Congressional action was an outrageous reversal of existing concepts. That there is a normal working day in West Coast longshoring, and that all hours outside the normal day have long been regarded as true overtime hours, was the conclusion of the Senate Committee after extended hearings which included testimony of appellants' counsel. See pages 30-32, 41 of Appendix hereof. The evidence in our trial called for the same conclusion. Cf. dissenting opinion in *Bay Ridge Operating Co.* v. *Aaron*, 334 U. S. 446.

(b) At page 20 it is said that F.L.S.A. as originally enacted was "clear and unambiguous". To the contrary, see the statement of the Senate Committee (pp. 29, 40, *infra*) that "basically, the problem stems from the failure of the Congress to include in F.L.S.A. any definition of 'regular rate' of pay".

(c) At pages 12 to 15 an attempt is made to lead the Court to believe that the employers and government contracting agencies were utterly indifferent to the opinion of the Wage and Hour Administrator, and wilfully disregarded clearly established law. That this is not so appears from what the Senate Committee found (see pp. 33, 38, *infra*), and would be equally clear if the evidence in the present cases were read.

(d) At various places (see pp. 6, 7, 11, 16, 18) it is stated that the Supreme Court decision in the *Bay Ridge* case established the right of all longshoremen (not only on the East Coast but also in

statements occur in appellants' "Summary of Argument" on pages 4 and 5,[3] and at various points in the "Argument".[4]

If these statements are intended to lay a foundation for an argument that P. L. 177 and P. L. 393 are inapplicable to the employment practices in the instant cases, they are improper as in derogation of the stipulation above referred to.

If the statements purport to be a compliance with this Court's rule 20(e), requiring a statement of "the manner in which the questions [to be presented] arise", it is, to say the least, unfortunate that they are inaccurate.

To the extent that the factual and legal situation existing at the time of the enactment of the legislation might be thought relevant to the constitutional question, we believe the Court should look to the findings and statements of the House and Senate Committee, which appear at pages 21 and 28 of the Appendix of this brief. To attempt to determine the factual and legal situation by reference to the evidence and exhibits in the instant case would involve the Court in a great variety of disputes and arguments all of which we had supposed were set aside pending decision of the constitutional question.

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the present cases) to a recovery. If we should ever reach a discussion of the applicability of that decision to West Coast practices, vital distinctions between East and West Coast contracts would at once appear. Furthermore, the Supreme Court's mandate referring the cases back to the District Court authorized "any amendments to the complaint or answer or any further evidence that the District Court may consider just". The cases have been retried and are under advisement. Evidence and arguments were presented in support of the position that recovery was precluded even under the Supreme Court decision.

[3] In the Summary of Argument (pp. 4, 5) appellants assert that their rights had become "vested" because the *Bay Ridge* decision finally and conclusively established their right to a recovery. This is not so. See fn. 2(d).

[4] As to the statement at page 27 that appellants' rights had "matured" and "become vested" and "acquired", cf. fn. 2(d).

The statement at page 47 that P.L. 177 was not based on the same type of situation which prompted the enactment of the Portal-to-Portal Act flies in the face of the declarations of the Senate Committee appearing at pp. 36-40, *infra*.

SUMMARY OF ARGUMENT

Seventeen decisions in nine Circuit Courts of Appeals, including the decision of this Court in the case of *Lassiter, et al. v. Guy F. Atkinson,* 176 F. (2d) 984, have upheld the constitutionality of the retroactive provisions of the Portal-to-Portal Act of 1947. Certiorari has been denied in six of these cases. These decisions are dispositive of the question of the constitutionality of the Fair Labor Standards Act Amendments of 1949 if the legal issues as to constitutionality are the same under the two statutes. The situations leading up to the enactment of the two statutes, and the constitutional issues, are indeed the same, and were so recognized by the Congress. Cf. Appendix, pp. 36-40.

The findings of the Congress that the situation which was to be corrected by the retroactive amendment constituted a substantial burden on interstate commerce and the free flow of goods in commerce, and that it was the congressional purpose to relieve and protect interstate commerce from practices which burden and obstruct it, bring the case within the doctrine that determination of whether need exists for congressional action in a field within the plenary power of Congress, and a decision as to the extent and efficacy of the means to be adopted, are legislative functions over which the Courts have no control except in rare and extraordinary situations such as do not exist in the present case.

Apart from the precedential significance of the Portal Act decisions, it is clear that the Fair Labor Standards Act Amendments of 1949 are not unconstitutional, since the statute is an exercise of sovereign powers under the commerce clause, falling short of an outright taking of property; and such an exercise of sovereign power is not precluded by the fact that there will result a disruption of existing contractual relations or even a complete destruction of the benefits or value of contracts. Contracts, however expressed, cannot fetter the constitutional authority of Congress. When they deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from

the reach of dominant constitutional power by making contracts about them.

This is particularly true where the rights in question are created by, and conferred on private persons by, a statute passed in the exercise of plenary powers in aid of a dominant public interest. Rights thus created are not invalidated by the fact that they may affect or be in derogation of contractual arrangements existing at the time of their creation. Similarly, legislative modification of such rights is not prohibited by the circumstance that the modification affects arrangements made pursuant to the original enactment.

THE ACT OF JULY 20, 1940, PUBLIC LAW 177, 81ST CONGRESS, 1ST SESSION, AND THE ACT OF OCTOBER 26, 1949, PUBLIC LAW 393, 81ST CONGRESS, FIRST SESSION, COMMONLY CALLED "FAIR LABOR STANDARDS ACT AMENDMENTS OF 1949", ARE CONSTITUTIONAL.

It is assumed that this Court adheres to its decision in *Lassiter v. Guy F. Atkinson Co.*, 176 F. (2d) 984, upholding the constitutionality of the Portal-to-Portal Act of 1947.[5] This disposes of problems relating to P. L. 177 &

[5] A like result was reached in eight other circuits in the following cases:

Manofsky v. Bethlehem-Hingham Shipyards, Inc. (CCA 1), 177 F. (2d) 529;
Battaglia v. General Motors Corp. (CCA 2), 169 F. (2d) 254, certiorari denied, 335 U.S. 887;
Darr v. Mutual Life Insurance Co. (CCA 2), 169 F. (2d) 262, certiorari denied, 335 U.S. 871;
Thomas v. Carnegie-Illinois Steel Corp. (CCA 3), 174 F. (2d) 711;
Seese v. Bethlehem Steel Co. (CCA 4), 168 F. (2d) 58;
Cingrigrani v. B. H. Hubbert & Son, Inc. (CCA 4), 168 F. (2d) 993, certiorari denied, 335 U.S. 868;
Fisch v. General Motors Corp. (CCA 6), 169 F. (2d) 266, certiorari denied, 335 U.S. 902;
Newsom v. E. I. du Pont de Nemours & Co. (CCA 6), 173 F. (2d) 856, certiorari denied, 338 U.S. 824;
Rogers Cartage Co. v. Reynolds (CCA 6), 166 F. (2d) 317;
Busch v. Wright Aeronautical Corp. (CCA 6), 174 F. (2d) 322;
Lee v. Hercules Powder Co. (CCA 7), 171 F. (2d) 950;
Bumpus v. Remington Arms Co. (CCA 8), July 6, 1950, 9 WH Cases 484;
Role v. J. Neils Lumber Co. (CCA 9), 171 F. (2d) 706;

P. L. 393 if the situation with respect to them, and the legal issues as to their constitutionality, are the same as those relating to the Portal Act.

The situations and the resulting issues are indeed the same. The following quotation from Senate Report No. 402 with respect to H. R. 858 shows that the Senate so believed and so found:

> "We believe that the overtime-on-overtime claims cannot be distinguished from the claims covered by the Portal-to-Portal Act. In both cases the claims arose under the Fair Labor Standards Act and would not have existed were it not for that law; in both cases, the claims arose by reason of the failure of Congress to define a basic term in that Act—the 'workweek' in the portal-to-portal situation and 'regular rate' in this overtime-on-overtime situation; in both cases, prosecution of the claims violated the spirit of collective-bargaining agreements; in both cases, the filing of suits was deplored by responsible A. F. of L. officials; in both cases, the collection of claims would unfairly penalize employers who attempted in good faith to comply with the Wages-and-Hours law. Indeed, in every important respect the overtime-on-overtime claims closely parallel the portal-to-portal claims. In our opinion, the factual and legal findings recited in the Portal-to-Portal Act are equally applicable here, and the situation requires the same expeditious and equitable treatment by Congress."

The findings in Section 1 of the Portal Act, which were thus adopted by reference as applicable to P. L. 177, include those to the effect that the existing situation "constitutes a substantial burden on interstate commerce" and a "substantial obstruction to the free flow of goods in commerce", and that the amending statute was enacted "to relieve and protect interstate commerce from practices which burden and obstruct it".

These findings are important for the reason that the determination of whether a need exists for congressional

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Potter v. Kaiser Co. (CCA 9), 171 F. (2d) 705;
Adkins v. E. I. du Pont de Nemours & Co. (CCA 10), 176 F. (2d) 661;
McDaniel v. Brown & Root, Inc. (CCA 10), 172 F. (2d) 466.

action in a field within the plenary power of Congress, and decision as to the extent and efficacy of the means to be adopted, are legislative functions over which the Courts have no control except in rare and extraordinary situations.

In *United States* v. *Darby,* 312 U. S. 100, in the course of its discussion upholding the constitutionality of the Fair Labor Standards Act against the charge that it unconstitutionally interfered with existing employment contracts, the Court said, at page 115:

> "The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no concontrol. *McCray v. United States,* 195 U. S. 27; *Sonzinsky v. United States,* 300 U. S. 506, 513 and cases cited. 'The judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged power.' "

In *Overnight Motor Co.* v. *Missel,* 316 U. S. 572, the employer took the position that the *Darby* case went no further than a holding that Congress could legislate against conditions detrimental to a minimum standard of living. It was argued that Congress could not constitutionally regulate rates of pay which were above such a standard, nor hours not injurious to health. The Court held, however, that the decision as to the need or efficacy of legislative enactments in aid of interstate commerce was the function of the Congress and not of the Courts, saying, at page 577:

> "If, in the judgment of Congress, time and a half for overtime has a substantial effect on these conditions, it lies with Congress' power to use it to promote the employees' well-being."

Similarly in *Bunting v. Oregon,* 243 U. S. 426, where the issue was whether a State law regulating hours of labor in mines violated the Fourteenth Amendment, the Court said, at pages 437-438:

> "But we need not cast about for reasons for the legislative judgment. We are not required to be sure of the precise reasons for its exercise or be convinced of

> the wisdom of its exercise. *Rast v. Van Deman & Lewis Co.,* 240 U. S. 342, 365. It is enough for our decision if the legislation under review was passed in the exercise of an admitted power of government; and that it is not as complete as it might be, not as rigid in its prohibitions as it might be, gives perhaps evasion too much play, is lighter in its penalties than it might be, is no impeachment of its legality."

It is true that where contract rights are interfered with by a legislative enactment which is justified as an exercise of the police power or solely on the basis that the contract is charged with a public interest, the recitals in the legislation are not conclusive, and the Courts can examine into the facts to see whether the legislature has transgressed the limits of its powers. But the existence of an emergency is not a condition precedent to the right to exercise the police power or constitutional powers (*Veix v. Sixth Ward Assn.,* 310 U. S. 32, 38-40); and the burden of establishing invalidity is on the attacking party (*Weaver v. Palmer Bros.,* 270 U. S. 402, 410; *Minnesota Rate Cases,* 230 U. S. 352, 452); and the Courts are without power to strike down the legislation except on overwhelming proof of complete inappropriateness and unjustifiability of the statute. The true doctrine is stated by Chief Justice Hughes in *Norman v. B & O RR Co.,* 294 U. S. 240. After having established the basic principle that Congress may regulate the currency even at the expense of contractual commitments and rights, he came to the point now under discussion—namely, the right or power of the Courts to pass upon the need or appropriateness of the legislation. At page 311 he said:

> "Despite the wide range of the discussion at the bar and the earnestness with which the arguments against the validity of the Joint Resolution have been pressed, these contentions necessarily are brought, under the dominant principles to which we have referred, to a single and narrow point. That point is whether the gold clauses do constitute an actual interference with the monetary policy of the Congress in the light of its broad power to determine that policy. Whether they may be deemed to be such an interference depends upon

> an appraisement of economic conditions and upon determinations of questions of fact. With respect to those conditions and determinations, the Congress is entitled to its own judgment. We may inquire whether its action is arbitrary or capricious, that is, whether it has reasonable relation to a legitimate end. If it is an appropriate means to such an end, the decisions of the Congress as to the degree of the necessity for the adoption of that means, is final."

Continuing at page 313, he indicated the narrow limits of the Court's function in the following language:

> "Can we say that this determination is so destitute of basis that the interdiction of the gold clauses must be deemed to be without any reasonable relation to the monetary policy adopted by the Congress?"

In the light of these pronouncements we turn to a statement of various facts which to us clearly show that the situation confronting the Congress was not so destitute of relationship to the well-being of interstate commerce as to empower the Court to interfere.

(a) Following the Supreme Court decision of June 7, 1948 in *Bay Ridge Operating Co. v. Aaron,* 334 U. S. 446, and as the date of expiration of the existing longshoremen's collective bargaining agreement in New York drew near, the employers and union found themselves unable as a practical matter to adjust the industry to the decision. A costly strike followed. A Board of Inquiry appointed by the President under the Labor Management Relations Act of 1947 reported the reality and sincerity of the impasse, A temporary arrangement was finally reached to bridge the gap until such time as remedial legislation might be enacted as recommended by the United States Department of Labor ("Hearings before Subcommittee of the Committee on Labor and Public Welfare, U. S. Senate, 81st Cong., 1st Sess. on S. 336 and H. R. 858," pp. 33-36, 554; cf. also letter of Secretary of Labor at p. 2).

(b) The same problem existed in other industries having similar types of contract (S. Rep. No. 402 on H. R. 858, pp. 21, 28, *infra*); and enactment of the amendment was advo-

cated, through personal appearances or letters, by a large number of industries other than longshoring. The statements and letters emphasize that clock-hour arrangements similar to that involved in the *Aaron* case exist in these other industries; that the construction placed on F.L.S.A. by the *Aaron* decision was not welcomed by either employers or employees in these industries; that attempted adjustments to meet the decision disrupted long-established and satisfactory collectively bargained agreements; that satisfactory adjustments were always difficult, and not infrequently quite impracticable; and that employers and employees had believed that their contracts met the requirements of F.L.S.A. as interpreted in Wage & Hour Administration's Interpretative Bulletin No. 4.[6]

(c) The potential liability under the Supreme Court decision in the *Aaron* case, *supra,* was estimated as high as $300,000,000 in the longshore industry (S. Rep. 402, p. 28, infra; and statements by Supreme Court, 334 U.S. at fn. 1, p. 454), and as "substantial" in other industries (S. Rep. 402, p. 29, infra).

(d) Not less than 137 cases brought on behalf of longshoremen were instituted between June 1943 and June 1947. Not less than 200 additional suits were instituted shortly after the decision of the Court of Appeals for the Second Circuit, in the *Aaron* case.

(e) The Senate Subcommittee held extended hearings resulting in a record of 826 printed pages.[7] They heard at

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[6] See Hearings before Senate Committee: Edison Electric Institute and other electric light and power companies (pp. 83, 117, 119, 194, 195); brewers (pp. 183, 194); Lumber Manufacturers Ass'n (pp. 181, 625); refrigerator and warehouse companies (pp. 190, 195, 613, 627); meat packers (pp. 123, 623); bakers (p. 401); Cotton Compress & Warehouse Ass'n (p. 335); machinery manufacturers (pp. 196, 615); gas companies (pp. 195, 618); plasterers, lathers and other building trades and general contractors (pp. 194, 610, 616); theaters (p. 194); candy makers (p. 605); sand and gravel and concrete mix (p. 605); printers (p. 613); paper manufacturers (p. 614); orchardists (p. 616); glass manufacturers (p. 621); ropes makers (p. 627); garment manufacturers (p. 629); grocery companies (p. 628).

[7] Entitled: "Hearings Before a Subcommittee of the Committee on Labor & Public Welfare, United States Senate, 81st Congress, 1st

length from employers and employees and Government officials; from counsel for plaintiffs in the pending East and West Coast longshoremen cases; and from representatives of C.I.O., A.F.L. and International Longshoremen's Association; and received a large amount of documentary material.

(f) There was no opposition to an amendment having prospective operation. Retroactivity "was opposed principally by counsel for claimants who have instituted suits to recover so-called 'overtime on overtime' "; and by C.I.O. A.F.L. did not oppose. The International Longshoremen's Association "strongly suggested the need of such relief." The bill originally had been limited to longshoring and the construction trades. There was "no serious objection" to broadening the bill to cover industry generally (S. Rep. 402, pp. 30, *infra*).

(g) The reasons for the retroactive provision which were regarded by the committee as impelling include all those stated in Section 1 of the Portal Act as the basis for that legislation—namely, windfall payments in derogation of bona fide collective-bargaining agreements; the inequity of penalizing employees who stood by their agreements, and employers who acted in good faith; the fact that the claims sprang from the wartime exigencies; the absence of notice from the Wage and Hour Administrator that the practices were illegal; the filing of suits deplored by A.F.L.; and the serious financial consequences of a failure to legislate. The committee concluded that "the overtime-on-overtime claims cannot be distinguished from the claims covered by the Portal-to-Portal Act" (S. Rep. 402, pp. 36-40, *infra*).

(h) It was the intent of Congress to destroy pending overtime-on-overtime claims in the longshore industry and in other industries under similar contracts and practices. (S. Rep. 402. See also debate on concurrence in the House of Representatives set forth in Congressional Record July 14, 1949, pp. 9670, 9671, 9674, 9677, 9679.)

Session on S. 336 and H. R. 858." A copy was sent to the court in connection with the case of *Biggs* v. *Joshua Hendy Corporation*, No. 12257.

(i) In response to an inquiry from the Committee, Mr. McComb, the present Wage and Hour Administrator, stated (Hearings before Subcommittee, p. 291):

> "The position of the former Administrator with respect to premium rates of time and one-half for work performed on holidays, Saturdays, or Sundays was that such premiums were overtime pay and could be offset against any amounts required to be paid for overtime work by the Fair Labor Standards Act."

(j) The 1947 Annual Report of the Wage and Hours Public Contracts Division of the Department of Labor contained the following statement (Hearings before Subcommittee, p. 494):

> "There are many other supplementary pay arrangements, however, which do not appear to undermine the overtime requirements of the act and which are considered advantageous by both management and labor. These include certain types of profit-sharing plans and arrangements for time and one-half pay or better for work during specified hours of the day, or days of the week. The very purpose and desirability of such pay arrangements are frequently defeated by the requirement that such payments must be included in the regular rate of pay in computing overtime compensation. Some modification of the term 'regular rate of pay' appears to be necessary to permit the utilization of such arrangements in industry within the framework of the Fair Labor Standards Act without at the same time opening the gates for the widespread evasion of the intent of Congress."

(k) On February 18, 1949, the Secretary of Labor wrote the Committee in part as follows (Hearings before Subcommittee, p. 2):

> "The Department of Labor favors prompt enactment of legislation such as is contained in S. 336 in order to remove serious difficulties in the maintenance of desirable labor standards arrived at through collective-bargaining agreements, and in order to prevent labor disputes in the industries affected by the proposed legislation. Expeditious action on this measure is necessary at this time in order to eliminate the im-

> minent possibility that such disputes may occur when existing temporary arrangements in the longshore and stevedoring industries to meet the problem expire."

In the face of the foregoing, it is hard to see how any Court could question the sincerity or correctness of the Congressional finding that enactment of P.L. 177 was necessary "to relieve and protect interstate commerce from practices which burden and obstruct it." Surely it cannot be said that there was no "reasonable relationship" between the existing situation and the well-being of interstate commerce. This being so, there is an end to the power of the Court to further consider or review the justification for the legislation.

We turn now to discussion of the basic issue of the constitutional limits of Congressional legislative power.

We believe that the problem has been confused at times by arguments which deal with the matter as one of confiscation of rights, when in reality no confiscation is involved.

There are a host of cases making it too clear to be questioned any longer that the exercise of sovereign powers in a manner not involving an outright taking of property for Government use is not precluded by the fact that there will result a disruption of existing contractual arrangements or even a complete destruction of the benefits or value of contracts. See, for example, imposition of maximum prices on sales of coal in *Sunshine Anthracite Coal Co. v. Adkins,* 310 U. S. 381; taking possession and operation of telegraph lines when deemed necessary for the national defense in *Dakota Central Telephone Co. v. South Dakota,* 250 U. S. 163; the suspension of tariff provisions upon findings that the duties imposed by a foreign state are reciprocally unequal and unreasonable in *Field v. Clark,* 143 U. S. 649; the regulation of radio stations according to public interest, convenience and necessity in *National Broadcasting Co. v. United States,* 319 U. S. 190; the prohibition of "unfair methods of competition" not defined or forbidden by the common law in *Federal Trade Commission v. Keppel & Brother,* 291 U. S. 304; and the allocating of marketing quotas among the states and producers in *Mulford v. Smith,*

307 U. S. 38; imposition of price controls under the Price Control Act of 1942, in *Yakus v. United States,* 321 U. S. 414; nullification of gold clause provisions in corporate bonds, as a result of regulation of the currency, in *Norman v. B&O RR Co.,* 294 U. S. 240; the imposition of a moratorium on foreclosure of mortgages in *Home Bldg. & Loan Assn. v. Blaisdell,* 290 U. S. 398.

The controlling doctrine is stated by Justice Holmes in *Omnia Co. v. United States,* 261 U. S. 502. In that case the plaintiff had a valuable contract for delivery to him of the entire output of a particular plant, and the contract was wholly nullified by the taking over of the plant by the United States for war purposes. In denying a recovery for the resulting loss the Court said, at page 508:

> "The contract in question was property within the meaning of the Fifth Amendment, and if taken for public use the Government would be liable. But destruction of, or injury to, property is frequently accomplished without a 'taking in the constitutional sense' ".

At page 510 the Court said:

> "For the consequential loss or injury resulting from lawful governmental action, the law affords no remedy. The character of the power exercised is not material."

At pages 509-510 the Court quoted with approval the following statements from *Louisville & Nashville R.R. Co. v. Nottley,* 219 U. S. 467, 484:

> "It is not determinative of the present question that the commerce act as now construed will render the contract of no value for the purposes for which it was made. In *Knox v. Lee,* 12 Wall. 457, above cited, the court, referring to the Fifth Amendment, which forbids the taking of private property for public use without just compensation or due process of law, said: 'That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a

> draft, or a war, may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of the contracts."

In *Norman v. B&O RR, supra,* the Court, at page 305, approved the conclusions reached in the legal tender cases, "that contracts must be understood as having been made in reference to the possible exercise of the rightful authority of the Government, and that no obligation of a contract 'can extend to the defeat' of that authority", and that the Fifth Amendment referred only to a "direct appropriation". Passing on to the contention that "Congress is seeking not to regulate the currency, but to regulate contracts, and thus has stepped beyond the power conferred", the Court said, at pages 307-308:

> "This argument is in the teeth of another established principle. Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them."

In many of the foregoing cases the rights which are interfered with, impaired, or destroyed existed under, and had all the sanctity which attaches to, private contracts. If such rights may be thus affected by exercise of sovereign powers, how much clearer is the power to interfere where, as in the present case, the asserted rights had no independent contractual origin, but had been created solely by an act of the sovereign and therefore presumably could be modified or withdrawn by the sovereign.

That rights created by statute, when not perfected by final judgment, may be destroyed by repeal or modification of the statute was decided in *Coombes v. Getz,* 285 U. S. 434, 447, 448; *Flannigan v. Sierra,* 196 U. S. 553, 560; and *Battaglia v. General Motors* (CCA 2), *supra.* The Supreme Court has clearly indicated its view that rights under

F. L. S. A. fall into this category. In *Brooklyn Bank v. O'Neill,* 324 U. S. 697, they were described as "statutory rights conferred on private parties, but affecting the public interest"; and as "private rights created by federal statute" (pp. 704-705). The refusal of the Court to validate releases was for the very reason that the rights were not subject to control by contract (pp. 707, 708). The right to liquidated damages was said to be merely one part of an entire remedy; and one section, 16(b), was said to "create the obligation for the entire remedy" (p. 711). At page 709 the rights of employees were described as of a "private-public character", and the Court said that "although this right to sue is compensatory, it is nevertheless an enforcement provision", in aid of attainment of the objectives of the Act.

The protection of rights fixed by final judgments is based on the policy of necessary repose and quieting of litigation and respect for the judicial branch—considerations which are not present in the present case. It is also to be noted that there is no basis for a claim that plaintiffs' rights have become "vested" because of an equity arising from a change of position in reliance on F. L. S. A. or its interpretation by the Wage and Hour Administrator or the Courts. The employment arrangement was made in the belief of both sides that it complied with F. L. S. A. In other words, it was not modified to incorporate F. L. S. A. provisions. In Senate Report 402, pp. 39-40; cf. 31, 32, 36, 37, infra, attention was called to the fact that all that P. L. 177 really did was to affirm and validate contracts which were acceptable to the parties and which had been interfered with by the construction placed on them by the Supreme Court.

The constitutional power to modify F. L. S. A. surely can be no weaker than the power to superimpose F. L. S. A. on existing contracts at the time of its enactment and thus change existing rights and obligations. In *United States v. Darby,* 312 U. S. 100, and *Opp Cotton Mills v. Administrator,* 312 U. S. 126, the constitutionality of F. L. S. A. was upheld against charges that it violated the Tenth Amendment and the due process clause of the Fifth Amendment, and was an unconstitutional delegation of legislative power to the

Administrator. The constitutional question arose again in *Overnight Motor Co. v. Missel, supra,* where an unsuccessful attempt was made to restrict the application of the statute to minimum wages and hours necessary to good health of employees. The refusal of the Court in *Brooklyn Bank v. O'Neill, supra,* to recognize the validity of settlements and releases for amounts less than the Act called for was an interference with the contracting rights of the parties. Thus the Act interfered with existing contracts in its inception. Since this is lawful, it must be equally lawful to interfere with the relationships which follow the passage of the Act. See, to this effect, the statement at page 577 in the *Missel* case, *supra,* that private contracts, whether before or after the passage of legislation, cannot take overtime transactions from the reach of dominant constitutional power. The subject matter is at all times within the control of the Congress.

CONCLUSION

For all the foregoing reasons, we think it is clear that the Supreme Court has made repeated pronouncements which indicate that its denial of certiorari in the Portal Act cases was because it believed the Circuit Court rulings as to its constitutionality were correct; and that the same reasoning supports the constitutionality of P. L. 177 and P. L. 393.

Respectfully submitted,

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APPENDIX

Act of July 20, 1949, Public Law 177, 81st Congress, 1st Session:

"AN ACT

"To clarify the overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 7 of the Fair Labor Standards Act of 1938, as amended, is amended by adding at the end thereof a new subsection (e), to read as follows:

'(e) For the purpose of computing overtime compensation payable under this section to an employee—

'(1) who is paid for work on Saturdays, Sundays, or holidays, or on the sixth or seventh day of the workweek, at a premium rate not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days, or

'(2) who, in pursuance of an applicable employment contract or collective bargaining agreement, is paid for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding forty hours), at a premium rate not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek,

the extra compensation provided by such premium rate shall not be deemed part of the regular rate at which the employee is employed and may be credited toward any premium compensation due him under this section for overtime work.'

"Sec. 2. No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of said employer to pay an employee compensation for any period

of overtime work performed prior to the date of enactment of this Act, if the compensation paid prior to such date for such work was at least equal to the compensation which would have been payable for such work had the amendment made by section 1 of this Act been in effect at the time of such payment."

Act of October 26, 1949, Public Law 393, 81st Congress, 1st Session:

"An Act

"To provide for the amendment of the Fair Labor Standards Act of 1938, and for other purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the 'Fair Labor Standards Amendments of 1949'.

Declaration of Policy

"Sec. 2. Section 2(b) of the Fair Labor Standards Act of 1938, as amended, is amended to read as follows:

'(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.'

* * * * *

"Sec. 7. Section 7 of such Act is amended to read as follows:

'Sec. 7. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

'(d) As used in this section the "regular rate" at which an employee is employed shall be deemed to in-

clude all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—

* * * * *

'(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or forty in a workweek or in excess of the employee's normal working hours or regular working hours, as the case may be;

'(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days; or

'(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding forty hours) where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek.

* * * * *

'(g) Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (d) shall be creditable toward overtime compensation payable pursuant to this section.'

* * * * *

[Sec. 16] "(e) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended (in any action or proceeding commenced prior to or on or after the effective date of this Act), on account of the failure of said employer to pay an employee compensation for any period of overtime work performed prior to July 20, 1949, if the compensation paid prior to July 20, 1949, for such work

was at least equal to the compensation which would have been payable for such work had section 7 (d) (6) and (7) and section 7 (g) of the Fair Labor Standards Act of 1938, as amended, been in effect at the time of such payment.

"(f) Public Law 177, Eighty-first Congress, approved July 20, 1949, is hereby repealed as of the effective date of this Act."

House of Representatives

81st Congress, 1st Session

Report No. 121

Clarifying Overtime Compensation in Certain Industries under the Fair Labor Standards Act

February 15, 1949.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. Lesinski, from the Committee on Education and Labor, submitted the following

Report

[To accompany H. R. 858]

The Committee on Education and Labor, to whom was referred the bill (H. R. 858) to clarify the overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, as applied in the stevedoring and building construction industries and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as so amended do pass.

The amendments are as follows:

(*a*) Page 1, line 7, after the word "employee" and before the dash, insert "employed in the longshore, stevedoring, building and construction industries".

(*b*) Amend the title so as to read:

A bill to clarify the overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, as applied in the longshore, stevedoring, building and construction industries.

Statement

Under collective bargaining arrangements antedating the Fair Labor Standards Act of 1938, covering employees in the longshore, stevedoring, building and construction industries, work at straight-time rates has long been limited to specified hours of the day and week which were established in good faith under such agreements as the basic, normal, or regular workday or workweek for such employees. Under these agreements, work outside the basic, normal, or regular workday or workweek has traditionally been considered overtime and has been paid for at an overtime rate providing compensation 50 percent or more in excess of the bona fide rate payable during the basic, normal, or regular workday or workweek. Work performed on Saturdays, Sundays, holidays or on the sixth or seventh day of the workweek was likewise ordinarily made compensable at such contract overtime rates. The same pattern of compensation for employees in these industries was continued in collective bargaining agreements executed since the fair Labor Standards Act of 1938 became effective.

Under the decisions of the Supreme Court of the United States in *Bay Ridge Operating Co.* v. *Aaron* and *Huron Stevedoring Corp.* v. *Blue* (335 U. S. 838), handed down on June 7, 1948, it was settled that the premium payments made to longshoremen for Saturday, Sunday, holiday, and night work under such agreements were not true overtime premiums for purposes of the Fair Labor Standards Act but were, rather, payments for work at undesirable hours. As such, the existing provisions of the Fair Labor Standards Act required that they be included in computing the regular rate of such employees and that they could not be credited toward overtime compensation due under the act.

The committee has heard testimony of representatives of labor, management, and the Department of Labor, all of whom are in agreement that the present law, in circumstances such as those considered by the Supreme Court in the Bay Ridge case, is creating serious difficulties in the maintenance of desirable labor standards arrived at through collective bargaining in the longshore, stevedoring, building and construction industries, and that amendment of the act to correct this situation is urgently necessary in order to prevent labor disputes which would seriously burden and obstruct commerce.

The potential effects of the present overtime requirements of the Fair Labor Standards Act on these types of agreements were demonstrated in the negotiation of a new

contract for the east coast longshore industry in the fall of 1948. The inability of the parties to agree on a substitute for their traditional work pattern was an obstacle to settling a crippling strike. The anticipation of prompt legislative action to remedy this situation was one of the factors inducing settlement.

Analysis of H. R. 858

H. R. 858 provides that the following extra compensation shall not be deemed a part of the regular rate at which an employee in the named industries is employed, for purposes of computing overtime compensation under section 7 of the Fair Labor Standards Act of 1938, and may be credited toward overtime payments required by such section:

1. Premium rates for work on Saturdays, Sundays, or holidays or on the sixth or seventh day of the workweek where the premium rate is not less than one and one-half times the rate established in good faith for like work performed during nonovertime hours on other days;

2. Premium rates for work outside of the basic, normal, or regular workday (not exceeding 8 hours) or workweek (not exceeding 40 hours) established in good faith by contract or agreement where the premium rate is not less than one and one-half times the rate established in good faith by contract or agreement for like work performed during such workday or workweek.

The effect of the amendment made by paragraph (1) of the bill may be illustrated by reference to an employee who is paid for work on Saturdays, Sundays, and holidays at a premium rate which is at least one and one-half times the bona fide rate for like work performed during nonovertime hours on other days. The extra compensation for such work provided by the premium rate will, under the amendment, be excluded in computing his regular rate of pay and may be credited toward overtime compensation required by section 7 of the act.

The effect of paragraph (2) of the amendment may be illustrated by reference to provisions typical of the applicable collective bargaining agreements traditionally in effect between employees and employers in the longshore and stevedoring industries on the east and west coasts. These agreements specify straight-time rates applicable during the hours established in good faith under the agreement as the basic, normal, or regular workday and workweek. On the east coast, such workday and workweek are established as 8 hours each day, Monday through Friday, be-

tween the hours of 8 a. m. and 12 noon and 1 p. m. and 5 p. m. On the west coast, such workday and workweek are established as the first 6 hours of work each day, Monday through Friday, between the hours of 8 a. m. and 5 p. m. Work outside such workday and workweek is paid for on both coasts as premium rates not less than one and one-half times the bona fide straight-time rates applicable to like work when performed during the basic, normal, or regular workday or workweek.

Under the amendment, the extra compensation provided by such premium rates will be excluded in computing the regular rate at which employees so paid are employed, and may be credited toward overtime compensation due under the Fair Labor Standards Act. For example, if an employee is paid $1 an hour for handling general cargo during the basic, normal, or regular workday and $1.50 an hour for like work outside of such workday, the extra 50 cents will be excluded from the regular rate and may be credited to overtime pay due under the act. As a further example, if the straight-time rate should be higher due to handling dangerous or obnoxious cargoes, in recognition of skill differentials, or for other similar reasons, so as to be $1.50 during the basic, normal, or regular workday and a premium rate of $2.25 is paid for such work outside of such workday, the extra 75 cents would similarly be excluded from the regular rate and could be credited toward overtime pay due under the act.

It should be noted that both paragraph (1) and paragraph (2) are limited to rates and work patterns "established in good faith." This phrase is used for the purpose of distinguishing the agreements subject to the bill from fictitious schemes and artificial or evasive devices such as have been condemned in a long line of decisions by the Supreme Court and several circuit courts of appeals, including, to mention a few, *Walling* v. *Helmerich & Payne* (323 U. S. 37), *Walling* v. *Alaska-Pacific Consolidated Mining Co.* (152 F. (2d) 812 (C. C. A. 9)), *Robertson* v. *Alaska Juneau Gold Mining Company* (157 F. (2d) 876), and *Walling* v. *Youngerman-Reynolds Hardwood Company* (325 U. S. 419). The bill would in no way validate such schemes or devices or affect the principles established by this line of decisions. In this regard it may be pointed out that, in the longshore industry on both coasts, the contractual basic workdays are bona fide arrangements of long standing reflecting the established practice of the parties as contrasted with artificial or fictitious standards.

Because of the history of collective bargaining in the longshore and stevedoring industries, which has primarily given rise to the need for this amendment, the committee believes it should point out its understanding as to the employees in these industries to whom the bill would apply. The bill, as it affects the longshore and stevedoring industries, is intended to apply to employees who are actually engaged in the handling of water-borne cargoes (which includes baggage, mail, and ships stores) in connection with the loading or unloading of ships and to employees employed by stevedore contractors or steamship companies or ocean freight terminal operators in processes or occupations necessary to the handling of such water-borne cargoes. The bill applies to employees such as car loaders and terminal warehousemen who actually handle water-borne cargoes in connection with the loading and unloading of ships, and employees (such as coopers, watchmen, maintenance workers, and ship clerks) who perform other work in connection with the loading and unloading of ships. Such employees must perform work at marine piers, docks, wharves, terminals, or related storage facilities in order to come within the provisions of the bill. Employees who are not employed by stevedore contractors or steamship companies or ocean freight terminal operators and who may occasionally handle water-borne cargoes, such as truck drivers and drivers' helpers, are not intended to be included within the longshore and stevedoring industries, for purposes of this bill.

Changes in Existing Law

In compliance with paragraph 2a of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as introduced, are shown as follows (new matter is printed in italics, existing law in which no change is proposed is shown in roman):

Fair Labor Standards Act of 1938, Approved June 25, 1938

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand hours during any period of twenty-six consecutive weeks,

(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand hours during any period of fifty-two consecutive weeks, or

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature,

and if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c) In the case of an employer engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into syrup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits

or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

(d) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

(e) For the purpose of computing overtime compensation payable under this section to an employee—

(1) who is paid for work on Saturdays, Sundays, or holidays, or on the sixth or seventh day of the workweek, at a premium rate not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days, or

(2) who, in pursuance of an applicable employment contract or collective-bargaining agreement, is paid for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding forty hours), at a premium rate not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek,

the extra compensation provided by such premium rate shall not be deemed part of the regular rate at which the employee is employed and may be credited toward any premium compensation due him under this section for overtime work.

Calendar No. 391

SENATE

81st Congress, 1st Session

Report No. 402

CLARIFYING OVERTIME COMPENSATION UNDER THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED

May 18 (legislative day, April 11) 1949—Ordered to be Printed

Mr. HILL, from the Committee on Labor and Public Welfare, Submitted the Following

REPORT

[To accompany H. R. 858]

The Committee on Labor and Public Welfare, to whom was referred the bill (H. R. 858) entitled "A bill to clarify the overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, as applied in the longshore, stevedoring, building, and construction industries," having considered the same, now report the said bill, with amendments, and recommend that said bill, as so amended, do pass.

Statement

This bill is intended as an amendment to section 7 of the Fair Labor Standards Act of 1938 and is designed to correct a situation which has developed in connection with the so-called "clock overtime" or "overtime on overtime" issue. While this problem has arisen in a number of industries in this country, it has assumed particular importance in the longshore and stevedoring industries. In those industries, it has become particularly acute because of the decision of the Supreme Court in the case of *Bay Ridge Operating Co., Inc.* v. *Aaron* (334 U. S. 446, 1948) and a series of claims instituted in the courts seeking to recover, under the Fair Labor Standards Act of 1938, extra compensation allegedly due by reason of the failure of these industries to compute overtime compensation in compliance with that act. Estimates of the possible liability of industry generally vary substantially. The minimum figure which has been cited for the longshore and stevedoring industries is $10,000,000, but other estimates for these industries range up to a figure approximating $300,000,000. In other industries, such as electric and gas utilities, where continuous

operations are essential, the potential liability is undetermined but of a substantial nature.

Basically, the problem stems from the failure of the Congress to include in the Fair Labor Standards Act any definition of "regular rate" of pay. The applicable provisions of that act read as follows:

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

* * * * *

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

The bill, the adoption of which this committee recommends, would have the effect of furnishing a partial definition of "regular rate" of pay, in that the following extra compensation would not be deemed a part of the regular rate of pay [1] for the purpose of computing statutory overtime and would be creditable toward overtime payments required by the law:

1. Premium rates for work on Saturdays, Sundays, or holidays, or on the sixth or seventh day of the workweek, where the premium rate is not less than one and one-half the rate established in good faith for like work performed during nonovertime hours on other days;

2. Premium rates for work outside the basic, normal, or regular workday (not exceeding 8 hours) or workweek (not exceeding 40 hours) established in good faith by contract or agreement where the premium rate is not less than one and one-half times the rate established in good faith by contract or agreement for like work performed during such workday or workweek.

Two main questions were raised before your committee. As passed by the House, by a vote of 230 to 7, the bill applied only to future claims and was limited to the longshore, stevedoring, building, and construction industries. There was

[1] A full definition of "regular rate" of pay is now being considered by your committee in connection with the over-all revision of the Fair Labor Standards Act proposed in S. 653.

testimony to the effect that the House Committee on Education and Labor was unable to act upon the suggestion that a provision be added giving the bill retroactive effect because, it was claimed, under the rules of the House such a provision would not have been germane since the bill as originally introduced did not cover retroactivity.

In the hearings before your committee, substantial issues were raised as to (1) whether the bill should be made retroactive to protect employers against existing claims for so-called "overtime on overtime" and (2) whether the bill should be broadened to include industry generally, instead of being restricted to the industries mentioned above. A subcommittee heard extensive testimony on both of these points from union and industry spokesmen, from counsel for claimants who have filed suit, and from certain of the executive departments and agencies. At the close of the hearings, briefs were requested by the subcommittee.

At the hearings, the proposal for retroactive validation of the provisions in collective bargaining or other employment agreements conforming to the standards generally agreed upon for future application was opposed principally by counsel for claimants who have instituted suits to recover so-called "overtime on overtime". They were joined in opposition by counsel for the CIO. On the other hand, the retroactive feature was not opposed by the A. F. of L. and, while that organization did not affirmatively support the principle of retroactivity, testimony of the International Longshoremen's Association, the A. F. of L. union principally affected, strongly suggested the need for such relief. The executive departments either supported the proposal for retroactive relief or failed to register any opposition thereto. No serious objection was made to the proposal that the bill be broadened to include industry generally.

Upon a careful consideration of the testimony and briefs, the committee has concluded that the bill should be amended so as to validate past overtime practices under collective bargaining or other agreements, thus avoiding the payment of "overtime on overtime" for the past as well as for the future. We have also concluded that the bill should be made general in its application.

Background

A. The longshore and stevedoring industries

Briefly stated, the problem which has arisen may be illustrated and explained by reference to the pay practices in

the longshore and stevedoring industries. In these industries, as well as others, it has been customary for employers and labor organizations representing the employees to provide by contract that compensation at the rate of one and one-half times the straight-time rate shall be paid for work outside the straight-time hours stipulated in the contract. Thus, in the stevedoring industry the straight-time hours or normal workday has been fixed, on the east coast, from 8 a. m. to 12 noon and 1 p. m. to 5 p. m. weekdays; on the west coast, the first 6 hours of work, exclusive of mealtime, between 8 a. m. and 5 p. m., are the straight-time hours. Work after 5 p. m. and before 8 a. m. in the stevedoring industry on both coasts has been paid at a rate of one and one-half times the straight-time rate for the normal working hours. It should be noted that the payment of this premium rate is not dependent upon the employee having previously worked any specified number of hours, but is based upon the performance of work at particular times which are treated as outside the normal working day. Similarly, on both coasts work on Saturdays, Sundays, and holidays has been paid at the time-and-one-half premium rate without regard to work previously done during the workweek.

These arrangements have been in effect since 1916, when the International Longshoremen's Association made its first collective-bargaining contract with employers in New York. One of the purposes of this arrangement, substantially realized, was to concentrate the work of the longshoremen in the straight-time hours.[2] The intended effect of such

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[2] The following figures, compiled in Justice Frankfurter's dissenting opinion in the *Bay Ridge case* and based upon the record and lower court findings, indicate the exceptional nature of "overtime" work:

	1932–37 average	Oct. 24, 1938 (effective date of FLSA) to Aug. 31, 1939 (eve of war)	Apr. 1, 1944–Mar. 31, 1945 (height of war-time activity)
Work performed during straight-time hours	79.93%	75.03%	54.5%
Night work	15.13%	17.89%	20.5%
Week-end work	4.94%	7.08%	25.0%
Total night work by men who had worked during same day	13.2 %	23.29%	44.5%
Ditto by those who had not	86.8%	76.71%	55.5%
Total man-hours, consisting of night work by those who had not worked during same day	2.57%	4.17%	11.1%
Concentration of man-hours, straight time over overtime	11.22	8.47	3.38

concentration was to bring about the employment of more men as there is pressure for more work to be done in the straight time hours. (See *Bay Ridge Operating Co., Inc.* v. *Aaron et al.,* 334 U. S. 446, 470.) This arrangement also served to compensate longshoremen for working at undesirable times.

After the enactment of the Fair Labor Standards Act, both parties to the longshore agreements proceeded on the assumption that the employer would receive credit under the act for overtime stipulated in the collective-bargaining agreement for all overtime work, including that work which was performed outside the normal working hours and for which the premium rate of time and one-half was paid. The parties took this position without regard to whether or not payment of this premium rate was premised upon the number of hours previously worked. Indeed, the parties expressly referred in their contract to these payments as "overtime." There is no evidence of any issue being raised with respect to this arrangement and its administration until October of 1943.

Indeed, in December 1938, 2 months after the Fair Labor Standards Act became law, representatives of the industry on the west coast were officially advised by the regional attorney of the Wage and Hour Division that "clock overtime" at one and one-half the contract straight-time rate met the overtime provisions of the act. The inquiry was whether, in computing statutory overtime under labor agreements or company practices which—

fix a straight-time rate and also an overtime rate of pay at one and one-half the straight-time rate, the former being applicable during specified hours of the day, the latter after the expiration of a maximum number of hours specified or at certain times such as at night or on Sundays or holidays—

it was proper to take the view that—

the term "regular rate" as used in the act is the straight-time rate and not the overtime rate.

The regional attorney replied that—

where collective-bargaining agreements or company practices have established a straight-time hourly rate of pay and also an overtime hourly rate of pay at one and one-half times the straight-time rate, the straight-time rate is the "regular" rate, within the meaning of section 7 (a) of the Fair Labor Standards Act.

The Administrator of the Wage and Hour Divison consistently held, prior to the Bay Ridge decision, that premium rates for week-end and holiday work of at least one and one-half times the rate paid during the normal or regular working hours were true statutory overtime rates, and hence were to be excluded in computing the "regular rate" for overtime purposes and could be credited against statutory overtime. (See Interpretative Bulletin No. 4, U. S. Department of Labor, Wage and Hour Division, pars. 13, 69, 70.)

By letter dated October 15, 1943, the Administrator of the Wage and Hour Division advised the War Shipping Administration, for the account of which a substantial amount of all stevedoring work was then being done, that the so-called "clock overtime" provided for in labor contracts for work after 5 p. m. did not constitute statutory overtime. He suggested that conferences be held to consider the problem. The effect of this administrative interpretation was to treat the "clock overtime" rate as a part of the "regular rate" of pay which should be used as a basis for calculating the statutory liability for hours worked in excess of 40 hours per week. It also denied to the employer the right to apply the 50 percent premium to any statutory liability arising from working his employees in excess of 40 hours a week. No complaint was made as to the propriety of treating the "contract overtime," rate for week-end and holiday work as statutory overtime. As disclosed in the table cited above, between April 1, 1944, and March 31, 1945, about 45 percent of the work was being performed during contract overtime hours, about equally divided between night work (i. e., after 5 p. m.) and weekend work.

The testimony before this committee reveals that, following this letter, extended conferences were held between the Administrator and the War Shipping Administration as well as other branches of the Government, including the War and Navy Departments, and the Department of Justice. All Government agencies, except the Wage and Hour Division, were of the opinion that the overtime practices of the industry were valid. The Administrator refrained from taking final and formal action on the issue or from attempting to enforce his position through injunctive action, as he had the right to under section 17 of the Fair Labor Standards Act. Government contracting agencies instructed the industry to maintain their normal practices and early in 1945 entered into indemnity agreements protecting the stevedoring companies against liability.

Except for special situations of limited scope in Puerto Rico and Davisville, R. I., the broad issues out of which the Bay Ridge decision resulted developed from litigation instituted in 1945. It is significant to note that, prior to the institution of these suits, the employees were compensated in accordance with the previous understanding of the parties to the collective-bargaining agreement without complaint of either labor organizations or individual employees. The district court ruled against the claimants but was reversed by the circuit court of appeals and the Supreme Court upon appeal. The majority of the Supreme Court, in the Bay Ridge decision, held that the statutory overtime concept was based upon "excessivity" and that the so-called clock overtime provided for in the collective-bargaining agreement therefore did not fall within the statutory concept.

B. Other industries

In industries other than longshore, stevedoring, and building and construction, it has also been a practice of long standing to pay premium rates of time and one-half, pursuant to collecting-bargaining agreements for work before or after certain designated hours or for work on week ends and holidays. Thus, a study by the Bureau of Labor Statistics, published in the Monthly Labor Review for October 1947, and based on an analysis of over 400 union contracts covering slightly over 2,000,000 workers in 31 manufacturing and nonmanufacturing industries, showed that about half of the agreements contained provisions for premium pay of at least time and one-half for week end and holiday work. More specifically, the Bureau found that (1) over 50 percent of the agreements, "covering over 750,000 workers * * * had provisions requiring penalty rates for work performed on Saturday as such"; (2) "about 60 percent, covering a similar proportion of workers, required penalty rates for Sunday work as such"; (3) "more than four-fifths of all workers in the sample received premium pay for production work on holidays"; and (4) in several industries, including automobiles, cotton textiles, men's clothing, and canning and preserving, agreements specified premium pay of time and one-half for work outside an employee's regular shift. The study further stated that—

more than 80 percent of the workers who received premium pay for Saturday or Sunday as such were paid time and a half for Saturday work and double time for Sunday work,

irrespective of the number of hours previously worked during the week—

while of those paid premium rates for holiday work—two-thirds were paid double time, and a third, time and a half.

It is readily apparent, therefore, that the "overtime on overtime" problem, especially that aspect of it which relates to week-end and holiday work, is of general application.

Testimony presented to your committee by representatives of nonmaritime industries fully substantiates the fact that the "overtime on overtime" problem is not confined to the longshore and stevedoring industries. Mr. Walker Cisler, executive vice president of the Detroit Edison Co., testified that the union contracts of that company, which, of course, operates on a continuous basis, require the payment of time and one-half for work outside scheduled hours. He estimated the potential liability of that company for overtime on overtime at "well over $1,000,000 annually." Representatives of other public utilities, such as Cleveland Electric Illuminating Co. and the Wisconsin Public Service Corp., testified in support of the bill. Mr. C. B. Boulet, director of personnel of the Wisconsin Public Service Corp., testified that, based upon his experience as the chairman of the industrial relations committee of the Edison Electric Institute, the problem for utilities generally is serious and merited prompt relief.

In addition, D. W. Tracy, president of the International Brotherhood of Electrical Workers (AFL), the oldest and largest labor organization in the electric utility field, in a formal statement to the committee, said:

I heartily support the legislation which has been proposed for the longshoring stevedoring, and building and construction industries. It is my view, based upon the experience of the brotherhood in dealing with the overtime-on-overtime problem in the many industries of the United States where we represent employees, that there is an equal need for quick action in the electric utility industry prior to the enactment of the general amendments to the wages and hours laws.

Additional evidence before the committee from various industries, including general construction, meat packing, brewing, warehousing, printing, and publishing, makes clear that the perplexing problem of "overtime on overtime" is

not confined to the longshore and stevedoring industries. In consequence, it is apparent that the bill should be of general application, and your committee so recommends.

RETROACTIVITY

The only question remaining for consideration is whether the provisions of this bill should be made retroactive so as to prevent the maintenance of suits now pending or the enforcement of claims which shall have accrued prior to the enactment of this bill.

In considering this question, we have been fully cognizant of the traditional policy against the granting of such relief except under special circumstances. Deviations from this policy, we believe, should not be made lightly, for retroactive relief is an extraordinary remedy.

The issue which the committee has had to resolve was whether the facts establish the special circumstances warranting retroactive relief. We are of the opinion that they do. The considerations prompting this conclusion are as follows:

1. The claims are in the nature of windfalls and in derogation of the collective-bargaining agreements as understood in the past by the contracting parties. The longshore contract involved in the Bay Ridge case specifically stated that all time not denominated straight time "shall be considered overtime and shall be paid for at the overtime rate." Moreover, the denial of retroactive relief would, in effect, penalize the large bulk of employees who have chosen to abide by the terms of the collective agreement. The inequity of allowing such claims to prevail is further aggravated by reason of the fact that the bulk of such claims arose from wartime exigencies which distorted normal work patterns.

2. The premium arrangements, understood by the contracting parties to conform to the statutory overtime requirements, were the result of collective bargaining. There is no evidence that the bargaining was other than at arm's length. It resulted in an arrangement which was highly advantageous to the employees covered by the collective agreement. As the district court found in the Bay Ridge case, there was 8½ times as much contractual overtime as there was overtime measured by the number of hours in excess of 40 worked for one employer. Further, to the extent to which the arrangement was intended to and did spread employment by encouraging the concentration of

work in straight-time hours, it is consistent with one of the main purposes of the maximum hour provision of the Fair Labor Standards Act.

3. The House and Senate reports on the Fair Labor Standards Act strongly support the view that the act was—

intended to aid and not supplant the efforts of American workers to improve their position by self-organization and collective bargaining (H. Rept. No. 1452, 75th Cong., 1st sess., p. 9; S. Rept. No. 884, 75th Cong., 1st sess., pp. 3-4).

4. Without retroactivity, the effect upon many companies that have an important impact upon commerce may be disastrous. As to the longshore industry, estimates of potential liability range from $10,000,000 to approximately $300,000,000. It is contended that the Government would assume much of the potential liability. This would appear to be the situation, at least in those areas covered by War Shipping Administration contracts, as a result of the cost-plus-fixed-fee arrangement and the 1945 indemnity agreement. It is questionable, however, whether the same result would follow outside this area, as, for example, contracts with the War Department, which did not contain any cost-plus-fixed-fee provision. It is probable, therefore, that the industry, in the event of successful prosecution of these cases, would not be completely insulated. The evidence presented to your committee reveals that the average stevedore has a net worth of between $100,000 and $250,000; that his annual wage bill is between 10 and 15 times his net worth; that collection of claims, adding only 5 percent per annum to his wage bill for only 2 years, will threaten bankruptcy to many of the companies affected. Liability for even a small portion of these claims will threaten the survival of many of these companies.

5. On the basis of the evidence, it seems reasonably clear that prior to 1943, the parties had no notice of their potential liability under the overtime provisions of the Fair Labor Standards Act. Indeed, as early as December 1938, in a letter written by the regional attorney of the Wage and Hour Division in San Francisco, to a representative of the longshore industry, the statement was made that the clock overtime arrangement constituted statutory overtime. This letter was part of the evidence produced in the recent trial of the issue before the Federal district court in California, as part of the good-faith defense under the Portal-to-Portal Act (Public Law 49, 80th Cong.). The court rendered judgment

against the plaintiffs on the basis of this defense. See *Moss* v. *Hawaiian Dredging Co.,* decided March 30, 1949, Case No. 25299–G, United States District Court, Northern District of California, Southern Division.)

6. Great reliance is placed by opponents of retroactivity upon the position taken by the Wage and Hour Division in 1943 and subsequent thereto. In a letter to the War Shipping Administration, dated October 15, 1943, the Administrator stated that in his view the overtime practice of the longshore industry was in violation of the overtime provisions of the Fair Labor Standards Act. He noted that any change in wage practices of firms operating under contract with the War Shipping Administration required approval of that agency and therefore invited comments and suggestions from it. There followed numerous conferences among interested Government agencies and it was the view of the War Shipping Administration, the Army and Navy, and the Department of Justice, that the Wage and Hour Administrator was wrong in his construction of the act. While the Administrator is vested with responsibility of administering the Fair Labor Standards Act, and consequently his views are to be accorded considerable weight, his judgment is not necessarily infallible. Thus, the Administrator, during this period, continued to uphold the propriety of crediting week end and holiday contract overtime against statutory overtime, although it is to be noted that the Supreme Court subsequently ruled that this practice was likewise erroneous. These circumstances, i. e., the division of view among responsible Government officials, the length of the period during which the parties had observed this practice without issue being raised, and the fact that there was a reasonable question as to the correctness of the Administrator's view, deprive the notice argument of much of its persuasive force.

The committee therefore recommends that the bill include a provision for retroactivity. Precedent for such a retroactive provision is found in the Portal-to-Portal Act. Under section 2 of that act, Congress provided relief against portal-to-portal claims arising out of the Supreme Court decision in the *Mt. Clemens case* (328 U. S. 680). Under section 3 (d) of that act, Congress retroactively validated compromise agreements which had been rendered invalid by the Supreme Court decision in *Schulte* v. *Gangi* (328 U. S. 108). In section 9, Congress provided for good-faith defense against existing Wage and Hour claims of all kinds in order

to meet the problems resulting from Supreme Court decisions in cases such as *Jewell Ridge Coal Corp.* v. *Local No. 6167, UMW* (325 U. S. 161), and *Addison* v. *Holly Hill Fruit Products, Inc.* (322 U. S. 607).

The action of Congress in the Portal Act in meeting the problems arising from these decisions represented a lawful and proper exercise of its legislative functions. Under the Fair Labor Standards Act, the courts are precluded from granting equitable relief, however harsh or oppressive the consequences. "Such matters," the courts have declared, "are for Congress and not for the courts" (*Missel* v. *Overnight Motor Transportation Co.*, 126 F. (2d) 98, 111, affirmed 316 U. S. 572). (See also *Birbalas* v. *Cuneo Printing Industries,* 140 F. (2d) 826, 829.)

The constitutionality of the Portal-to-Portal Act has been sustained in more than 100 Federal court decisions, including 10 decisions by 6 different circuit courts of appeal: *Rogers Cartage Co.* v. *Reynolds,* 166 F. (2d) 317 (C. C. A. 6); *Seese* v. *Bethlehem Steel Co.,* 168 F. (2d) 58 (C. C. A. 4); *Atallah* v. *B. H. Hubbert & Son, Inc.,* 168 F. (2d) 993 (C. C. A. 4); *Battaglia* v. *General Motors Corporation,* 169 F. (2d) 254 (C. C. A. 2); *Darr* v. *Mutual Life Insurance Company,* 169 F. (2d) 262 (C. C. A. 2); *Fisch* v. *General Motors Corporation,* 169 F. (2d) 266 (C. C. A. 6); *Role* v. *J. Neils Lumber Company,* 171 F. (2d) 706 (C. C. A. 9); *Potter* v. *Kaiser Co.,* 171 F. (2d) 705 (C. C. A. 9); *Lee* v. *Hercules Powder Company,* 171 F. (2d) 950 (C. C. A. 7); *McDaniel* v. *Brown & Root, Inc.,* 172 F. (2d) 466 (C. C. A. 10). In every case where an effort was made to secure Supreme Court review of lower court decisions, the Supreme Court has declined to grant certiorari: *Battaglia* v. *General Motors Corporation,* 335 U. S. 887; *Darr* v. *Mutual Life Insurance Company of New York,* 335 U. S. 871; *Atallah* v. *B. H. Hubbert & Son, Inc.,* 335 U. S. 868; *Fisch* v. *General Motors Corporation,* 335 U. S. 902. In this connection, the following quotation from Judge Parker, speaking for the Circuit Court of Appeals of the Fourth Circuit in *Seese* v. *Bethlehem Steel Co.* (168 F. (2d) 58, at 64) is especially pertinent:

Looked at in another way, all that Congress has done by the legislation here under consideration is to validate the contracts and agreements between employer and employee which were invalid under the Fair Labor Standards Act by reason of the interpretation placed by the Supreme Court upon that act; and the authority of the legislative body to validate voluntary transactions which at the time they were

have been condemned in a long line of decisions by the Supreme Court and several circuit courts of appeals, including, to mention a few, *Walling* v. *Helmerich & Payne* (323 U. S. 37), *Walling* v. *Alaska-Pacific Consolidated Mining Co.* (152 F. (2d) 812 (C. C. A. 9)), *Robertson* v. *Alaska Juneau Gold Mining Company* (157 F. (2d) 876), and *Walling* v. *Youngerman-Reynolds Hardwood Company* (325 U. S. 419). The bill would in no way validate such schemes or devices or affect the principles established by this line of decisions. In this regard it may be pointed out that, in the longshore industry on both coasts, the contractual basic workdays are bona fide arrangements of long standing reflecting the established practice of the parties as contrasted with artificial or fictitious standards.

The effect of section 2 of the bill would be to make the provisions of section 1 retroactive so as to prevent the maintenance of suits now pending or the enforcement of claims which may have accrued prior to the enactment of this bill. The intent of section 2 is to treat as overtime premium any portion of the compensation paid in any workweek pursuant to the standards contained in section 1 which was paid prior to the date of enactment at a rate of not less than time and one-half the rate applicable for the same work during nonovertime hours. If any portion of the contractual overtime compensation in any workweek was paid at a rate of less than time and one-half the normal, basic, or regular rate for such work, that portion is not treated as overtime premium.

Changes in H. R. 858

Provisions in H. R. 858 which your committee recommends be omitted are printed in linetype, new matter is printed in italic, and provisions of H. R. 858, in which no change is recommended, are shown in roman.

[H. R. 858, 80th Cong., 1st sess.]

[Omit the part struck through and insert the part printed in italic]

An Act to clarify the overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, as applied in the longshore, stevedoring, building and construction industries

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 7 of the Fair Labor Standards Act of 1938, as amended, is amended by adding at the end thereof [a new subsection (e)] * *two new subsections, (e) and (f),* to read as follows:

"(e) For the purpose of computing overtime compensation payable under this section to an employee [employed in the longshore, stevedoring, building and construction industries—] *

(1) who is paid for work on Saturdays, Sundays, or holidays, or on the sixth or seventh day of the work week, at a premium rate not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days, or

(2) who, in pursuance of an applicable employment contract or collective bargaining agreement, is paid for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding forty hours), at a premium rate not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek,

the extra compensation provided by such premium rate shall not be deemed part of the regular rate at which the employee is employed and may be credited toward any premium compensation due him under this section for overtime work."

Sec. 2. No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act) on account of the failure of said employer to pay an employee compensation for any period of overtime work performed prior to the date of enactment of this Act, if the compensation paid prior to such date for such work to said employee was at least equal to the compensation which would have been payable to said employee for such work had the amend-

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* Struck out in copy.

ment made by section 1 of this Act been in effect at the time of such payment.

Passed the House of Representatives February 21, 1949.
Attest:

Ralph R. Roberts, Clerk.

Amend the title so as to read: "An Act to clarify the overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended."

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